

Message Text

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FM AMEMBASSY BRASILIA

TO SECSTATE WASHDC IMMEDIATE 3031

UNCLAS BRASILIA 10864

PLEASE PASS DR BRUNO RISTAU, DEPT OF JUSTICE

E.O.11652: N/A

TAGS: AFSP

SUBJECT: ANITA BERNSTEIN - LABOR SUIT AGAINST USG

REF: A. 74 STATE 250083 B STATE 281523 C 72 BRASILIA 3307

1. MRS. BERNSTEIN'S POSITION WAS ABOLISHED APRIL 27, 1974 AND SHE WAS DULY PAID SEVERANCE PAY FOR 8 YEARS, 10 MONTHS, 26 DAYS SERVICE. THEN AND SUBSEQUENTLY, SHE CLAIMED THAT SHE SHOULD HAVE BEEN PAID SEVERANCE PAY ON THE BASIS OF 11 YEARS AND 1 DAY BUT WAS INFORMED THAT HER PRIOR SERVICE WHICH BEGAN OCT 9, 1962 TO NOVEMBER 13, 1964 AND THE JUNE 1, 1965 TO APRIL 27, 1974 SERVICE REPRESENTED TWO SEPARATE PERIODS OF SERVICE WITH MORE THAN A 90 DAY BREAK IN SERVICE THUS HER PRIOR TIME WAS NOT USED IN THE COMPUTATION OF HER SEVERANCE PAY. MRS. BERNSTEIN RESIGNED HER EMPLOYMENT WITH DAO IN NOV 1964 TO ACCEPT EMPLOYMENT IN THE U.S.

2. MRS. BERNSTEIN HAS MADE REPEATED OVERTURES TO THE EMBASSY AND CONGEN RIO SEEKING ADDITIONAL SEVERANCE PAY AND HAS BEEN CONSISTENTLY ADVISED THAT SHE WAS PAID APPROPRIATELY AND HAD NO FURTHER CLAIM. THERE WERE INDICATIONS THAT MRS. BERNSTEIN MIGHT PURSUE HER CASE THROUGH LEGAL CHANNELS AND ON DECEMBER 15 EMBASSY WAS NOTIFIED BY JBUSMC, RIO THAT A SUMMONS HAD BEEN RECEIVED FOR A COURT APPEARANCE ON DEC 16. THE SUMMONS WAS DATED DEC 10 AND AFTER SEVERAL INQUIRIES, SGT. MARTINEZ, JBUSMC, CONFIRMED THAT THE SUMMONS HAD BEEN RECEIVED ON DEC 12.

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3. CONGEN RIO WAS INSTRUCTED TO OBTAIN THE SERVICES OF DR. SERGIO SARDENBERG WHO HAD REPRESENTED THE USG IN OTHER LABOR CASES, TO SEEK A DELAY TO PERMIT THE EMBASSY TO CONSULT WITH THE DEPT OF JUSTICE AND SEEK GUIDANCE. CONTRARY TO EMBASSY INSTRUCTIONS, SARDENBERG AFTER STUDYING THE CASE CONCLUDED BEST APPROACH WOULD BE TO NOT ATTEND HEARING AND USG SUBSEQUENTLY LOST CASE BY DEFAULT. SARDENBERG CLAIMS HIS INTENTION IS TO FILE PETITION CHALLENGING THE COMPETENCE OF THE LABOR COURT AND TO REQUEST CASE BE REFERRED TO FEDERAL COURTS.

4. SARDENBERG STATES HE HAS RECEIVED INSTRUCTIONS FROM BRUNO RISTAU OF JUSTICE NOT TO CLAIM IMMUNITY FROM JURISDICTION FOR USG BUT SIMPLY TO CLAIM INCOMPETENCE OF BRAZILIAN LABOR COURTS AND REQUEST REFERRAL OF CASE TO FEDERAL COURT (JUSTICA FEDERAL). EMBASSY DISCUSSED CASE WITH PAULO BEKIN WHO CONFIRMS SARDENBERG'S INTERPRETATION OF JUSTICE INSTRUCTIONS. BEKIN INDICATES THIS IS STRATEGY HE HAS ADOPTED IN ISABEL BAKER RIBEIRO CASE. APPROACH TO BE TAKEN BY BOTH ATTORNEYS APPEARS AT VARIANCE WITH INSTRUCTIONS CONTAINED IN REFERENCE BUT SARDENBERG STATES HE HAS BEEN SO INSTRUCTED BY BRUNO RISTAU AND ALSO STATES THAT RISTAU INSTRUCTIONS HAVE BEEN TO COMMUNICATE DIRECTLY WITH THE JUSTICE DEPT. SINCE LEGAL CASES ARE THE RESPONSIBILITY OF JUSTICE AND NOT THE DEPT. OF STATE. SARDENBERG CLAIMS THAT IF ANY NEW INSTRUCTION IS TO BE GIVEN TO HIM, EMBASSY MUST REQUEST DEPT. OF JUSTICE TO DO IT.

5. THIS SITUATION HAS ARISEN BEFORE WHERE JUSTICE DEPT HAS COMMUNICATED DIRECTLY BY TELEPHONE WITH LOCALLY PROCURED ATTORNEYS LEAVING THE EMBASSY AND THE CONGEN'S IN THE DARK AS TO WHAT PROCEDURES HAVE BEEN RECOMMENDED. IN REFTEL (C), EMBASSY POINTED OUT HAZARDS OF SUCH AN APPROACH AND REQUESTED LINE OF COMMUNICATIONS BETWEEN DEPT OF STATE AND JUSTICE AND EMBASSY.

6. EMBASSY IN COMPLETE AGREEMENT WITH STEPS TO BE TAKEN AS OUTLINED IN STATE 250083 WHICH IS SOMEWHAT AT VARIANCE WITH NOV 28, 1975 GUIDANCE. EMBASSY UNDERSTANDS THAT CONSISTENT APPROACH IN CASE OF SUITS AGAINST THE USG MAY INCLUDE DEFENSE BASED ON (A) LACK OF TIMELY NOTICE OF SUIT (B) IMPROPER SERVICE (C) NAMING OF INAPPROPRIATE DEFENDANT AND (D) THAT USG IS IMMUNE UNCLASSIFIED

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FROM SUIT IN LABOR COURT AS A MATTER OF BRAZILIAN LAW, NOT AS A MATTER OF SOVEREIGN IMMUNITY. THIS WOULD APPEAR TO BE APPROACH SARDENBERG SHOULD HAVE TAKEN IN CURRENT BERSTEIN CASE. IN THIS CASE SUMMONS RECEIVED ON FRIDAY DEC 12 AND ACCORDANCE LOCAL LAW, IF SUMMONS RECEIVED ON FRIDAY, DATE OF RECEIPT AND SATURDAY AND SUNDAY ARE NOT COUNTED IN REQUIRED NOTIFICATION PERIOD OF FIVE DAYS BEFORE COURT ACTION. (IF SUMMONS IS RECEIVED ON A THURSDAY, DATE OF RECEIPT DOES NOT COUNT BUT

FRIDAY, SATURDAY AND SUNDAY WOULD COUNT IN COMPUTING TIME PERIOD.) IMPROPER DEFENDANT HAS BEEN NAMED AND SERVICE WAS NOT MADE ON USG EMPLOYEE OF JBUSMC. UNDER BRAZILIAN LAW, EMBASSY HAS EIGHT DAYS FROM TIME OF JUDGMENT TO APPEAL DECISION WHICH MEANS EMBASSY ATTORNEY MUST TAKE ACTION PRIOR DEC 24.

7. ACTION REQUESTED: REQUEST JUSTICE DEPT CONFIRM LINE OF APPROACH AS PRESENTED IN 14 NOV 1974 INSTRUCTION AND FORWARD GUIDANCE THROUGH EMBASSY FOR ATTORNEY SARDENBERG'S ACTION IN TIME TO MEET DEADLINE. EMBASSY REQUESTS THAT TELEPHONIC INSTRUCTIONS TO ATTORNEYS BE CONFIRMED BY CABLE SO THAT RESPONSIBLE OFFICIALS WILL BE AWARE OF CONSISTENT APPROACH TAKEN BY JUSTICE DEPT, FOR PURPOSES OF FUTURE GUIDANCE TO ATTORNEYS, IN LABOR CASES.
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